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ABSTRACT

This paper discusses the fair use doctrine added to the Copyright Revision Act, Public Law 94-553 (October, 1976). Fair use, an exception to the exclusive rights of copyright, is an assurance to the public of reasonable access to its heritage as guaranteed by the First and Ninth Amendments to the Constitution. Several important cases are described as illustrations of how the concept has been interpreted in the past. According to this paper, the doctrine cannot be frozen in statute beyond a broad explanation of what fair use is and the statement of some criteria applicable to it. The law states that the courts must be free to adapt the doctrine to specific cases. Explanatory footnotes provide additional information on the topic. (MAI)

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THE FAIR USE DOCTRINE FROM ITS INCEPTION TO PUBLIC LAW 94-553

By

Kent H. Benjamin

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In October of 1976, a Copyright Revision Act, Public Law 94-553, was signed into law to replace the Copyright Act of 1909. One of the most interesting parts of the new act was the addition of the fair use doctrine to statutory copyright law. In the mid-sixties there was a considerable clamor for fair use to be included in the proposed copyright law revision.[1] In 1976 fair use was statutorily enacted for the first time in U.S. history. Section 107 of the new Copyright Act dealing with fair use reads as follows:

> Title 17, §107 Limitations on Exclusive Rights:
> Fair Use
> Notwithstanding the provisions of section 106, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use, the factors to be considered shall include
> 1) the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purpose;
> 2) the nature of the copyrighted work;
> 3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
> 4) the effect of the use upon the potential market for or value of the copyrighted work.[2]

The new Copyright Act goes into effect on January 1, 1978. This paper will attempt to show where the fair use doctrine came from, how it has changed, or if it has changed, and what

effect the statute may be expected to have on the application of the doctrine.

The general idea behind copyright law is to protect the creator or originator of some artistic, scientific, or literary work from having his work copied, appropriated, or used by another person without permission, or for some purpose other than that for which the creator intended it. When use is made of copyrighted material, whether innocently or intentionally, and the owner of the copyright sues the user for infringement of copyright, fair use is an affirmative defense.[3] Fair use, in effect, is an exception to the exclusive rights of the copyright owner.[4] The purpose of fair use may be said to be assurance to the public of reasonable access to its heritage as guaranteed by the 1st and 9th Amendments to the Constitution, notwithstanding the purported exclusive right of the copyright owner under statute.[5] The meaning and application of fair use has varied somewhat over the years, so first a few examples of fair use will be given.

There are several related but distinct tests for determining when a use is fair:[6] first, by looking at the extent and value of the extracted work; second, by determining whether the quoted portions might be used as a substitute for the original work; third, by determining the effect that the copied work has upon the distribution and object of the

original work.[7] A test commonly used in scientific and research oriented infringement cases is whether the author's work is the result of his own labors from common materials and sources of knowledge open to all, and whether any resulting resemblances are either accidental or arise from the nature of the subject.[8]

Use of copyrighted material for the purpose of criticism and comment is generally permissible, even when the copying is extensive,[9] but there can be no fair use before publication of original material.[10] Republication of governmentally originated material is permissible, provided the republisher doesn't use copyrighted material from within the governmental publication.[11] Acknowledgement by name of the author and work from which material is taken does not establish fair use; in fact, it could cause an inference of unfair use because it implies that the author gave consent.[12]

It is almost always an infringement of copyright to take not only the original author's facts and ideas but also his arrangement and treatment of the subject.[13] Infringement may be done by literal reproduction, by copying with more or less colorable alteration, by indirect copying, or by reproduction from memory.[14] The issue of fair use has been said to be a question of fact.[15] About the only sure thing about fair use was that whether the use was fair or unfair would be decided primarily from the circumstances of each

case.[16]

Fair use has by case law been extended to areas including journalism, teaching, criticism, burlesque, research, fiction, and music.[17] "It is a use which is permitted in order that a proper balance may be struck between society's interest, on the one had, in maintaining the pecuniary incentive of a creator to produce an intellectual property and, on the other, in facilitating the wide dissemination of knowledge and information."[18]

Fair use, as we know it, originated as an equitable principle the courts could apply in order to do justice as they saw it.[19] It was a judically derived doctrine based on equitable principles roughly analogous to the rule of "de minimis non curat lex," a Latin phrase referring to the fact that the law doesn't concern itself with trifles.[20] Classic fair use involves a use of copyrighted material so trifling that the law need have no concern with it. This concept became outdated as applied to fair use when advancing technology made copyright infringement easy, and often lucrative.

Fair use as a concept probably first appeared in England as the "fair dealing" doctrine,[21] eventually codified by Parliament in the Copyright Act of 1911 (and in Canada in 1921).[22] The "fair dealing" doctrine probably had some influence in America. Much of early fair use discussion was in the form of

dicta,[23] that is, comments by the judge related to the case but not part of the decision, and therefore not binding as precedent. Until the passage of the new Copyright Act in 1976, case law formed the basis of fair use decisions.[24]

The fair use doctrine made its first appearance in America in 1841 in Folsom v. Marsh,[25] a case involving an abridgement of a biography of George Washington in which letters to which the later author did not have access were used in his book. Justice Story virtually founded fair use by stating that most of the book need not be taken to constitute an infringement, and that the court should". . . look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supercede the objects of the original work . . ." to determine if the use was fair.[26] Without actually using the term "fair use,"[27] Justice Story laid the foundation for fair use cases to come.

It was in the fields of science, law, and medicine that fair use was first applied to a great extent. In Simms v. Stanton (1869), [28] the plaintiff published a scientific work, and the defendant infringed it in her subsequent work. It was said that courts must often look to the value of the material pirated rather than to the quantity.[29] A controlling factor was that both parties were scientific writers, were friends

and acquaintances, and were writing on the same subject.[30] The court said that the errors and repetitions common to both works were not important enough to constitute infringement, and allowed fair use to apply.[31] A few years later, a court decided that the use was not unfair in a case dealing with infringement of a legal encyclopedia where the infringement consisted of using lists published in the encyclopedia as a basis for doing research along different lines.[32] In 1916, the court faced the problem of whether a writer in a scientific journal availed himself of an earlier writer's work without doing independent research.[33] The court held that the plan and arrangement of a prior writing may be adopted and used by a subsequent writer as a fair use provided the subsequent writer applies that plan to an original product.[43] In Henry Holt & Co. v. Liggett and Myers Tobacco Co. (1938),[35] fair use was not allowed. In this case, the plaintiff, a doctor, had written a scientific book for teachers and students of voice on the human voice mechanism, and a tobacco company quoted three sentences out of context in a cigarette advertisement, along with the doctor's name, to convince comsumers that cigarette smoking did not affect the throat. The court held the use to be unfair, reflecting reluctance to find fair use in a commercial work taken from a scientific work.[36] A general principle in scientific fair use cases is

that any work done in these fields may have to draw upon previous works in order to extend human knowledge.[37]

The courts dealt with the problem of using one directory as the basis for compiling another directory in Jeweler's Circular Pub. Co. v. Keystone Pub. Co. The plaintiff had published a directory of trademarks, and the defendant had published a larger work called "The Jeweler's Index" containing illustrations of trademarks allegedly copied from the plaintiff's book.[38] It was held that a directory may be copyrighted;[39] furthermore, a directory as a whole may be copyrighted even though the parts are not copyrightable.[40] The court said that copyrighted materials could be used as a guide for original work by the defendant, but that using the plaintiff's book as a source and merely checking it for correctness would not be fair use.[41] A later directory case is Leon v. Pacific Telephone and Telegraph Co., (1937).[42] Here, the defendant compiled a telephone directory with numerical listings based exclusively on plaintiff's alphabetical phone directory. The defendant pleaded fair use on the ground that this directory was intended for a different purpose, but the court held that there would be no fair use when the defendant took substantially from the plaintiff's work without using his own labors.[43]

Fair use has been allowed in burlesques and parodies of

previously copyrighted works.[44] In the first major case in this area,[45] the plaintiff was the cartoonist who created "Mutt and Jeff." The defendant parodied "Mutt and Jeff" with cartoon creations of his own, even to the extent of using direct quotes in the film he produced and showed. In a brief decision, the court held that appropriation for the purpose of criticism is permissible, but the defendant's appropriation here was so substantial as to possibly cause the public to avoid seeing the original cartoons.[46]

Two contemporary burlesque cases which turned on the question of substantiality[47] involved comedians Jack Benny[48] and Sid Caesar.[49] Benny lost his case, and Caesar won his, the difference being primarily the amount and substantiality of the copied material. The court said in Benny that taking a dramatic performance and presenting it with a few minor variations could not be excused merely by calling the play a "burlesque" when copying of the original nearly verbatim.[50] Although Caesar won his case under similar circumstances,[51] the Columbia Pictures case is consistent with Benny because Caesar's burlesque was held to be a new and original work with no similarity as to theme, characterizations, general story line, detailed sequence of incidents, dialogue, points of suspense, etc.[52]

Theme, locale, or situation of a story may be used for a

burlesque; these aren't protectible by copyright. "... . a burlesquer must make a sufficient use of the original to recall or conjure up the subject matter being burlesqued."[53] Therefore the law permits more extensive copying in a burlesque than in any other dramatic or fiction work. A final word on burlesques: saying "I only burlesqued" is not per se a defense.[54]

There are few fair use cases in the newspaper business. The most famous is Chicago Record-Herald Co. v. Tribune Ass'n.[55] In this case, the Chicago Record-Herald had previously declined to purchase a particular news story, but later published an abridged but almost identical version of the story as it appeared in the Tribune, a rival newspaper, with a line attributing the story to the Tribune. The court held that what the defendant published was infringement because he not only took the idea but also the arrangement and manner of statement of the Tribune story. The use of a statement acknowledging the source of the story was not only not exculpation, but was in fact close to a representation of the plaintiff in a false light (another actionable offense).[56]

Magazine publishers have encountered fair use in defense of magazine infringements. A school of fashion modeling was in the habit of using reproductions of the covers of plaintiff's Vogue magazine to illustrate the covers of their advertising brochures as a means of attracting customers.[57]

The plaintiffs sued the modeling school to put an end to this practice. The court held first that the cover of a copyrighted magazine was included in the copyright protection, then stated that the extent of the defendant's infringement was substantial and no fair use would be allowed. The defendant's purpose was to promote their product using Vogue's prestige, and this was exactly what fair use tried to prevent; the court said, "No one is entitled to save time, trouble, and expense by availing himself to another's copyrighted work for the sake of making an unearned profit."[58]

During World War II, a fair use case dealing with fiction came to trial. Daphne Du Maurier was sued by the plaintiff, another author, who said an earlier magazine story and novel of hers had been substantially borrowed from to create the defendant's novel, Rebecca.[59] The borrowing here was not of plot and character but a series of concrete incidents and details which are within the protection of copyright laws. The court said the similarities were such as might naturally follow given the facts of the mystery. A general rule is that similarity of plots in fiction does not necessarily constitute an unfair use.[60]

Several famous fair use biography infringement cases were tried in the 50's and 60's. The first of these was Toksvig v. Bruce Pub. Co. in 1950.[61] The defendant published a

biography of Hans Christian Anderson containing information found originally in letters written by Anderson in Danish, and found in English only in the plaintiff's biography of Anderson. The defendant did not read Danish and did not have the letters translated into English, so the court found that she must have copied the material from the plaintiff's book. The question was not whether the defendant could have obtained the material by going to the same sources, but rather whether she did actually go the same sources and do her own work. The court found no fair use. In 1957, defendant's True magazine published an article on Abraham Lincoln that allegedly borrowed from the plaintiff's book, Why Was Lincoln Murdered?[62] The court found that the use was fair because the parties were both writing about the same person in the same period of his life, and there must of necessity be a number of similarities between the works.[63]

Another important biography case is Rosemont Enterprises Inc. v. Random House, Inc.[64] Howard Hughes, through his Rosemont Enterprises, had bought copyrights to three articles on himself that he didn't want republished. When the defendants attempted to publish a biography of Hughes based in part on the three Look magazine articles by then owned by Hughes, he sought and obtained an injunction against them in the trial court. The trial court judge said that the

extent of the borrowings, the purposes for which the material was used, and the apparent lack of independent research combined to indicate that there was no fair use of the Look material.[65] The case was reversed on appeal and fair use was allowed. The appeals court said the borrowed material was not necessarily so extensive as to be an infringement, and that, in any event, the element of public benefit in knowing about prominent and powerful men had to be taken into consideration. The court concluded that whether or not a biography is intended for commercial success is irrelevant to a determination of whether the use is fair or unfair if there is some public benefit offered by the book.[66] The court in addition stated that it could not hold that "an author is absolutely precluded from saving time and effort by referring to and relying on prior published material."[67] It disagreed with Toksvig as a matter of law, and said it is just such a waste of time as exemplified in that case that the privilege of fair use is designed to prevent.[68] The court also found that the two works involved were not in competition with each other. The concurring opinion said that Hughes was not being honest with the court, entered with unclean hands, and that alone should prevent him from winning in a court of equity.[69]

In another influential case, Time, Inc. v. Bernard Geis Associates,[70] public interest was again the primary consideration

in allowing fair use in a biography. The case involved the famous Zapruder film of the Kennedy assassination to which Time, Inc., owned the copyright. Time, Inc., refused to allow the defendant to publish certain frames from the film in a scholarly book on his assassination theory, so the defendant instead published sketches of the frames. Time sued, and although the court was reluctant at first to allow fair use because the defendant acted in the face of the plaintiff's refusal, the defendant got a summary judgement.[71] The defendant was allowed fair use because there was considerable public interest involved, the defendant could have gotten the material from other sources, and the book would not be bought because of the pictures, but rather for the author's theories and explanations.

Several cases in the sixties dealt with fair use in music copyrights. In Wihtol v. Crow, the defendant reproduced an arrangement he had made of the plaintiff's song, "My God and I," for use by his church and school choirs. The court did not allow fair use, holding that it seemed inconceivable that copying all or nearly all of a song could be held a fair use just because the defendant had no intent to infringe. Intent is generally irrelevant in fair use cases. In a 1969 case[74] a defendant published a booklet on how to play guitar that featured an invention of the plaintiff's, the "Chord-O-

Matic," a quick way to learn guitar chords. The court held that the defendant's use greatly exceeded the scope of copying permitted under the doctrine of fair use.

In 1972, a religious group presented their "non-perverted" version of the play "Jesus Christ Superstar," making almost complete use of the plaintiff's original music and libretto, changing only the characters, relationships, and stage sets of the original.[75] Defendants argued fair use on the basis that this version was for purposes of criticism of the original. The court gave a good summary of fair use when it said wholesale copying of the plaintiff's work couldn't be a fair use because: (1) it copied the original exactly; (2) it was a substitute for the original; (3) it injured the plaintiff financially; (4) it was in competition with him; and (5) it did not serve or advance greater public interest in the development of news, art, science, or industry.[76]

In 1973, the first Supreme Court fair use decision came down. The case is Williams & Wilkins Co. v. United States.[77] The plaintiff, a publisher of medical journals, sued the Department of Health, Education, and Welfare through the N.I.H. (National Institute of Health) and the N.L.M. (National Library of Medicine) for making thousands of unauthorized copies of the plaintiff's medical journal articles. Both institutions tried to keep down the number of copies they made,

and had policies of limiting requests.[78] The copying was clear copyright infringement, but the question was whether or not it was permissible as a fair use. In the past photocopying had been allowed on a limited basis.[79] Single copies made by lawyers and judges for their own use were acceptable to the court. The court gave judgement for H.E.W., and made a number of important comments. First, the court said that the benefit of the doubt would be extended to science and the libraries rather than to the publisher and owner until Congress acted more specifically.[81] The suggestion in Leon v. Pacific Tel. & Tel. Co. that the copying of an entire work can never be a fair use was held to be overbroad and was rejected.[82] Three specific reasons were given for the decision: 1) the plaintiff had not shown that it would be substantially harmed by the photocopies; 2) medicine and medical research would be injured by holding photocopying to be an infringement; 3) without an indication to do so from Congress, the court would not place such a burden on the medical profession.[83] The plaintiffs in the case made a poor argument about financial harm, and were not able to dispute the defendants' figures.[84] Fair use was allowed, the court emphasizing that the holding in this case was restricted to the exact type of fact situation as the one here. Williams & Wilkins' argument was basically economic--a complaint that

they didn't want to be forced out of business.[85]

Several things might be said as a result of this case. The court here consciously balanced economic rewards of the copyright owner against unhampered dissemination of knowledge.[86] The immediate effect is that libraries and copyright owners are no longer in doubt about photocopying infringements.[87] Libraries may have to work out in advance some licensing agreements for photocopying.[88] The burden of proof in respect to the effect of the use upon the potential market for or value of the copyrighted work may be on the plaintiff in the future.[39] Since the majority emphasized that its holding was very narrow, a problem may arise because no precedent has been set except as regards suits against the government in the Court of Claims, so the circuit courts are free to disagree with it.[90] The main effect Williams & Wilkins probably had was to spur the Congress to enacting Public Law 94-553.

These cases should illustrate the basic premise of all fair use cases--that each must be decided on its own facts and circumstances. Fair use has been changed and modified over the years, but the changes from Folsom v. Marsh to Williams & Wilkins are not radical. Congress said in its report that "the endless variety of cases precludes the formulation of exact rules in the statute."[91] The Congressional Committee also mentioned several specific points of future development. For example,

they believe that a specific statute placing the burden of proof on one side or the other would be unfair and undesirable.[92]

One author thinks the new statute will cure any doubts about the Benny burlesque test.[93] Another asserts that work intended to be "consumable" for class use, for example workbooks or standardized tests, would not come under fair use.[94]

Public Law 94-553 was intended as a federal confirmation of a doctrine with a long history of tests and definitions that varied slightly from case to case. It is doubtful that the statute will significantly alter important case precedent. The Senate Judiciary Committee reported that there was ". . . no disposition to freeze the doctrine in the statute, especially during a period of rapid technological change. Beyond a very broad statutory explanation of what fair use is and some of the criteria applicable to it, the courts must be free to adapt the doctrine to the specific situation on a case-by-case basis."[95]

FOOTNOTES

[1]The orininal bill in the early sixties was H.R. 4347 which stated that "the fair use of a copyrighted work is not an infringement of copyright." H.R. Rep. No. 83. COPYRIGHT LAW REVISION, 90th Cong., 1st Sess. (1967) at 30. In April, 1967, House Bill H.R. 2512 was passed with virtually the same version of the fair use doctrine as eventually appeared in the new law. It was not enacted. In 1974, the Senate discussed an identical bill, S. 1361, but the bill died at the end of the term for lack of final action. Therefore,it took well over ten years for the first statutory fair use addition to get through the Congress. See Also: Senate Judiciary Committee Rep. No. 93-983, A Report to Accompany S. 1361, Copyright Law Revision, 93rd Cong., 2nd Sess., 115 (July 1974), for a good discussion of Congress' history of dealing with fair use. See Fisher, Arthur, Studies on Copyright, Vol. II, Fred Rothwan & Co., New Jersey, 1963, pp. 18-24, for an excellent discussion of pre-1960 legislative attempts at enacting a fair use law. One of many periodical articles in the mid-sixties calling for a statutory fair use doctrine is "Fair Use: A Controversial Topic in the Latest Revision of Our Copyright Law," 34 U.Cin.L.Rev. 73 (Winter 1965).

[2]Pub. L. 94-553, §101, Oct. 19, 1976 90 Stat. 2546.

[3]"Fair Use: The advisibility of Statutory Enactment," Joseph E. Casson, 13 Idea 240 (Summer 1969) at 807. An "affirmitive" defense is one which must be pled and proved in court to be effective. Fair use is not automatically available to a defendant.

[4]"Copyright: Limitation on Exclusive Rights, Fair Use," Houston L.Rev. 13:1041-61 (July 1976) at 1041.

[5]"Constitutional Division of "Fair Use' in Copyright Law," H.M. Rosenfield, Notre Dame Law 50:790-807 (June 1975) at 807.

[6]Wittenberg, Philip, The Protection of Literary Property, (Boston: The Writer, Inc., 1968) p. 133. This is just a summarized version of tests found in a large number of fair use cases ranging from the 1800's to the present.

[7]Toksvig v. Bruce Pub. Co., 181 F.2d 664 (7th Cir. 1950).

[8]Wittenberg, op. cit., p. 127.

[9]Ibid., p. 128.

[10]MacDonald v. DuMaurier, 114 F.2d 696 (2nd Cir. 1944).

[11]Wittenberg, p. 129.

[12]Ibid., p. 132.

[13]Ibid., p. 132 (This is reflected in Bradbury v. Columbia Broadcasting System, Inc., 287 F.2d 478 (9th Cir. 1961), which is discussed below.) This is also the basis of Chicago Record-Herald Co. v. Tribune Ass'n., 275 F.797 (7th Cir. 1921), which is also discussed below.

[14]Eisenshiml v. Fawcett Publications, Inc., 246 F.2d 598 (7th Cir. 1957).

[15]Matthews Conveyor Co. v. Palmer-Bee Co., 135 F.2d 73 (6th Cir. 1943). Esinshiml (op.cit.) says basically the same thing.

[16]18 C.J.S. Copyright and Literary Property §94 (1939) p. 219.

[17]The scope of fair use was explained to Congress in the Register's 1961 Report on pg. 24 as including:

> . . .quotation of excerpts in a review of criticism for purposes of illustration or comment, quotation of short passages in a scholarly or technical work, for illustration or clarification of the author's observations; use in a parody of some of the content of the work parodied; summary of an address or article, with brief quotations, in a news report; reproduction by a library of a portion of a work to replace a damaged copy; reproduction by a teacher or a student of a small part of work to illustrate a lesson; reproduction of a work in legislative or judicial proceedings or reports; incidental or fortuitous reproduction, in a newsreel or broadcasts, of a work located at the scene of an event being reported.

From: Sen. Jud. Comm. Rep. 93-983, op. cit.

[18]Pilpel, Harriet and Morton David Goldberg, A Copyright Guide, (R.R. Bowker Co., N.Y., 1969) p. 22.

[19]Casson, op. cit., p. 243.

[20]Ibid., 241.

[21]"Fair dealing" first appeared in 1838 in Sanders v. Smith Some copying was permitted as long as there was "fair dealing." Fair use doesn't seem to have come from "fair dealing," but rather to have developed as a counterpart to it. See: "Copyright Fair Use--Case Law and Legislation," Duke L.J., 1969: 73 (Fall 1969) at 74.

[22]Wittenberg, op. cit., p. 124.

[23]Casson, op. cit., p. 241.

[24]Several points need to be made on fair use cases. First, before 1973, there was no Supreme Court case on fair use, which meant that the case precedents on fair use were only binding on the courts in the districts from which they came. Second, by looking at the circuits and districts of the cases in this paper, it should be noted that most are from the 2nd and 9th districts (New York and California, basically) which indicates that the cases tended to cluster in the entertainment, literary and artistic,centers. Third, virtually all copyright cases (which means all fair use cases) are tried by the judge, without a jury; this could well have an effect. See: "Copyright . . .," Duke L.J., op cit., p. 84.

[25]9 Fed. Cas. 342 (C.C.D. Mass. 1841) (No. 4901).

[26]Ibid., p. 348. Due to the extreme age of the case, I was not able to locate the case itself; virtually all the periodicals in the paper mentioned Folsom v. Marsh, but my discussion of the case is largely taken from "What is Fair Use?", Leon Yankwich, 22 U.Chi. L.Rev. 203 (1954). The quote above is from p.210 in Yankwich. Yankwich quotes extensively from Story's opinion. For example, on page 343-44 (p. 205 Yankwich), Story says:

> So in cases of copyright, it is often exceedingly obvious, that the whole substance of one work has been copied from another, with slight omissions and formal differences only, which can be treated in no other way than as student evasions; whereas in other cases, the identity of the two

> works in question, and the question of piracy often depend upon a nice balance of the comparative use made in one of the materials of the other; the nature, extent, and value of the materials thus used; the objects of each work; and the degree to which each writer may be fairly presumed to have resorted to the same common sources of information, or to have exercised the same common diligence in the selection and arrangement of the materials.

Compare this to the new statute: it is remarkable how little later cases have altered Story's basic statements. It might be noted that the defendant here copied the remarkable number of 353 pages from the plaintiff's biography.

[27]According to Saul Cohen in "Fair Use in the Law of Copyright," Copyright and Related Topics: A Choice of Articles The Los Angeles Copyright Society and the U.C.L.A. School of Law, ed., (California, 1964), p. 111. the term "fair use" first appeared in Lewis v. Fullarton, 2 Beav. 6, 48 Eng. Rep. 1080, 1081 (Rolls Ct. 1839), and then in Jarrold v. Houlston, 3 K & J 708, 69 Eng. Rep. 1294, 1298 (Ch. 1857). It appeared later in the U.S.

[28]75 F. 6 (C.C. Cal. 1896).

[29]Ibid., p. 10.

[30]Ibid., p. 14.

[31]Ibid., p. 16.

[32]Edward Thompson C. v. American Law Book Co., 130 F. 639 (S.D.N.Y. 1904). aff. 157 F. 1003.

[33]Chautaugua School of Nursing v. National School of Nursing, 238 F. 151 (2nd Cir. 1916).

[34]Ibid., p. 153. The court also said that fair use would be determined by the circumstances of each case.

[35]23 F. Supp. 302 (E.D. Pa. 1938).

[36]The use was not made in the field for which the plaintiff intended it, in a scientific treatise or in a work designed to advance human knowledge, but was made purely for commercial purposes.

[37]Wittenberg, op. cit., pp. 126-7.

[38]281 F. 83, 26 A.L.R. 571 (2nd Cir. 1922), cert. denied 259 U.S. 581, 42 S.Ct. 464 (1922).

[39]Ibid., p. 574.

[40]Ibid., p. 576. According to the statute, trademarks may not be copyrighted.

[41]Ibid., p. 578.

[42]91 F. 2d 484 (9th Cir. 1937).

[43]Ibid., p. 487. There is interesting dicta here. The court said that it found no support for the idea that wholesale copying of copyrighted material can ever be fair use. In addition, it held that damages were not necessary for an action of this nature to lie.

[44]In a related but different vein, quite a large amount of copying is allowed in criticism; as long as you are making a critical analysis, you can quote or paraphrase extensively to emphasize and illustrate the original work.

[45]Hill v. Whalen, 220 F. 359 (S.D.N.Y. 1914).

[46]Ibid., p. 359.

[47]"Parody and Law of Copyright," 29 Fordham L. Rev. 570 (1961) p. 575. I am indebted to this article for giving me a better understanding of the relationship between these two cases.

[48]Benny v. Loew's Inc., 239 F. 2d (9th Cir. 1956), aff. 356 U.S.43, 78 S.Ct. 667, reh. denied 356 U.S. 934, 78 S.Ct. 700 (1958).

[49]Columbia Pictures Corp. v. National Broadcasting Co., 137 F. Supp. 348 (S.D. Cal. 1955).

[50]Benny had obtained the consent of MGM to present of fifteen minute burlesque of the movie "Gas Light." Seven years later he presented a thirty minute television burlesque of "Gas Light" on N.B.C. without the consent of M.G.M. Working from an actual shooting script of the movie, Benny presented the burlesque almost exactly as it was in the movie, with a few sight

gags added, the only real difference being the humor that came from Benny's gestures and manner of speaking. After mentioning that fair use had previously concerned complications, digests, listings, and the like, the court moved to the problem of excessive verbatim copying. The court said that burlesque is no defense to an action for copyright infringement. It said (at 537) that parody or burlesque is to be treated no differently from any other appropriation. When the amount taken is substantial, infringement exists. The fact that Benny was accustomed to doing this was no excuse. This case was heavily criticized at the time. See the Fordham L. Rev. article, op. cit..

[51]Sid Caesar performed a television parody called "From Here to Obscurity" based on the motion picture "From Here to Eternity." He took only enough from the original to continually remind the audience which movie he was burlesqueing. There is only a superficial resemblance to the original. This case took place a few months after Benny lost in the trial court.

[52]Columbia Pictures, op. cit., p. 354.

[53]Ibid., p. 354.

[54]Ibid., p. 350.

[55]275 F. 797 (7th Cir. 1921).

[56]Ibid., p. 799.

[57]Conde Nast Publications, Inc. v. Vogue School of Fashion Modeling, Inc., 105 F. Supp. 325 (D.C. 1952). The principal feature of Vogue magazine was portraying beautiful models wearing current and future fashions; the covers of Vogue magazine were a crucial part of its appeal. The defendant Vogue Modeling School was in no way connected to the plaintiff, but they seemingly did all they could think of to give the public that impression. Several infractions were involved in this case.

[58]Ibid., p. 333.

[59]MacDonald v. DuMaurier, 75 F. Supp. 655 (S.D.N.Y. 1948).

[60]You can go too far with this, however. Ray Bradbury wrote a short story that was copyrighted and expanded into a (copyrighted) novel, Farenheit 451. CBS presented a television drama that was strikingly similar, and Bradbury sued for infringement. There was no proof that the author of the TV

script had read the novel, but the court said that the fact that he had access to the novel was sufficient. The court held that the differences between the two works were no more than the writer believed necessary in order to adapt the story to TV. "Fair use may permit copying of theme or ideas of copyrighted works but not its expression." Bradbury v. Columbia Broadcasting System, Inc., 287 F.2d 478 (9th Cir. 1961). No fair use here because the defendant copied a great deal more than could possibly have been coincidental.

[61]181 F.2d 664 (7th Cir. 1950).

[62]Eisenshiml v. Fawcett Publications, Inc., 246 F.2d 598 (7th Cir. 1957), cert. denied 355 U.S. 907, 78 S.Ct. 334 (1957).

[63]The court allowed attorney fees to the plaintiff even though he lost the case. This is rare, and was apparently done here because the court felt the plaintiff had a strong case.

[64]366 F.2d 303 (2nd Cir. 1966), cert. denied 385 U.S. 1009, 87 S.Ct 714 (1967).

[65]256 F. Supp. 55, (D.C.N.Y. 1966) at 66. This was the trial court opinion.

[66]Rosemont, op.cit., p. 307. This is the circuit court again. This would seem to go against Henry Holt & Co. in which a reluctance to find fair use in an infringement for commercial profit is expressed; However, it should probably be distinguished because the court here is dealing expressly with biographies that have some public benefit. The facts distinguish the two cases.

[67]Ibid., p. 310.

[68]Ibid., p. 310.

[69]Ibid., p. 313. Hughes bought the Look copyright and sued the biographer six days later.

[70]293 F. Supp. 130 (S.D.N.Y. 1968).

[71]Several things should be mentioned about the court's opinion. The court found that news events could not be copyrighted, but that particular records of news events could be

copyrighted. The charcoal sketches were held to be copies under the statute. The court quoted the 1967 Copyright bill revision on p. 145 when discussing fair use. The court concluded by stating that each fair use case must be decided on its own facts. Another reason for the summary judgement was that the plaintiffs were not financially damaged, and the defendants had in fact offered to pay royalties.

[72]309 F.2d 777 (8th Cir. 1962).

[73]Ibid., p. 780.

[74]Trebonik v. Grossman Music Corp., 305 F. Supp. 339 (1969).

[75]Robert Stigewood Group Ltd. v. O'Reilly, 346 F. Supp 376 (D.C. 1972) U.S. Cert. denied. Plaintiff's work was a "rock opera" depicting the last seven days in the life of Christ. The character of "Jesus" was portrayed as effeminate, self-doubting, and in other less-than-religious ways. The defendants took a version of their own on the road portraying Christ as they thought he should be portrayed, but using the plaintiff's music and lyrics. Religious issues were dealt with by the court.

[76]Ibid., pp. 384-5.

[77]487 F.2d 1345 (1973).

[78]One copy per request with a limit of 40-50 pages, a limit on how much of each journal could be copied, and a limit on the number of copies each individual could receive.

[79]"Copyright--fair use--Photocopying and Distribution of Copyrighted Judicial Articles by Government Library Constitutes Actionable Infringement," Vand.L.Rev. 25:1093 (1973). There was a "Gentlemen's Agreement" reached to allow this in 1935. See also: "The Gentlemen's Agreement and the Problem of Copyright," 2 J. Documentary Reproduction 29 (1939).

[80]Williams & Wilkins, op. cit., p. 1353.

[81]Ibid., p. 1359.

[82]Ibid., p. 1353.

[83]Ibid., p. 1334.

[84]Ibid., p. 1358.

[85]"Photocopying as fair use--Williams & Wilkins Co. v. U.S., B.C. Ind. & Com L. Rev., 16:141-50 (N. 1974) at 144.

[86]Ibid., p. 150.

[87]"Copyright . . .", Vand. L. Rev., op. cit., p. 1103.

[88]Ibid., p. 1104.

[89]"Photocopying . . .", Ind. & Com, op. cit., p. 150.

[90]"The Doctrine of Fair Use as it Affects Libraries," I.C. Steneson, 68 Law Library Journal 254 (August 1975), Vol 3, p. 266.

[91]H.R. Rep. No. 83 op. cit., p. 32.

[92]Ibid., p. 37.

[93]"Copyright Fair Use . . .", Duke L.J., op. cit., p. 108.

[94]Senate Rep. No. 93-983 op. cit., p. 117.

[95]Ibid., p. 116.